UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

JOHN O. BAKKER, Plaintiff, vs. BARBARA KUHNES, DAVID SCOTT, MICHAEL McDONALD, DAVID OTTO, CHUCK STUBBE, and LISA KENNY, Defendants.	No. C01-4026-PAZ **ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

This matter is before the court on the defendants' motion for summary judgment, filed February 9, 2004 (Doc. No. 86). The plaintiff John O. Bakker ("Bakker") untimely resisted the motion on May 4, 2004. (Doc. No. 96) By order dated October 16, 2003, upon the parties' consent, this matter was reassigned to the undersigned United States Magistrate Judge for final disposition. (Doc. No. 81).

Currently an inmate at the Fort Dodge Correctional Facility in Fort Dodge, Iowa, Bakker filed this action against the defendants under 42 U.S.C. § 1983 to redress the alleged deprivation of his constitutional rights while he was confined at the Cherokee County Jail in Cherokee, Iowa. Bakker contends the defendants violated his constitutional right to be free from cruel and unusual punishment.[1] Specifically, Bakker alleges the defendants were deliberately indifferent to his serious medical needs because they

[1] The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amend. VIII. The Eighth Amendment is applicable to the states through the Fourteenth Amendment. *Rhodes v. Chapman*, 452 U.S. 337, 344-45, 101 S. Ct. 2392, 2398, 69 L. Ed. 2d 59 (1981).

dispensed his prescription medications at improper intervals. For the alleged violation of his constitutional rights, Bakker seeks compensatory damages, punitive damages, attorney fees pursuant to 42 U.S.C. § 1988, interest at the maximum legal rate, court costs, and such other and further relief as the court deems equitable and just.

The defendants seek summary judgment pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.1. The defendants maintain they are entitled to judgment as a matter of law because the record conclusively demonstrates Bakker failed to exhaust his administrative remedies. In light of the record, the defendants ask the court to enter judgment in their favor, and to assign their costs to Bakker.

The court finds the motion for summary judgment is fully submitted and ready for decision, the turns to consideration of the motion.

II. STANDARDS FOR SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment and provides that either party to a lawsuit may move for summary judgment without the need for supporting affidavits. *See* Fed. R. Civ. P. 56(a), (b). It further states summary judgment:

> [S]hall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). "A court considering a motion for summary judgment must view all the facts in the light most favorable to the nonmoving party, . . . and give [the nonmoving party] the benefit of all reasonable inferences that can be drawn from the facts." *Lockhart v. Cedar Rapids Comm. Sch. Dist.*, 963 F. Supp. 805, 814 (N.D. Iowa 1997) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).

The party seeking summary judgment must "'inform[ ] the district court of the basis for [the] motion and identify[] those portions of the record which show lack of a genuine issue.'" *Lockhart*, 963 F. Supp. at 814 (quoting *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992)). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986) (explaining initial burden of party seeking summary judgment). A genuine issue of material fact is one with a real basis in the record. *Lockhart*, 963 F. Supp. at 814 n.3 (citing *Hartnagel*, 953 F.2d at 394). Once the moving party meets its initial burden of showing there is no genuine issue of material fact, the nonmoving party, "by affidavits or as otherwise provided in this rule,[2] must set forth specific facts showing that there is a genuine issue for trial." *Lockhart*, 963 F. Supp. at 814.

Addressing the quantum of proof necessary to successfully oppose a motion for summary judgment, the Supreme Court has explained the nonmoving party must produce sufficient evidence to permit "'a reasonable jury [to] return a verdict for the nonmoving party.'" *Lockhart*, 963 F. Supp. at 815 (quoting *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). Furthermore, the Supreme Court has held the trial court must dispose of claims unsupported by fact and determine whether a genuine issue exists for trial, rather than "weigh the evidence and determine the truth of the matter." *Lockhart*, 963 F. Supp. at 815 (explaining *Anderson*, 477 U.S. at 249; *Celotex*, 477 U.S. at 323-24; *Matsushita*, 475 U.S. at 586-87).

The Eighth Circuit recognizes that "summary judgment is a drastic remedy and must be exercised with extreme care to prevent taking genuine issues of fact away from juries." *Wabun-Inini v. Sessions*, 900 F.2d 1234, 1238 (8th Cir. 1990) (citing *Wilson v. Westinghouse Elec. Corp.*, 838 F.2d 286, 289 (8th Cir. 1988)). The Eighth Circuit,

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[2] That is, by "affidavits . . . supplemented or opposed by depositions, answers to interrogatories, or further affidavits." Fed. R. Civ. P. 56(e).

however, also follows the principle that "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Id*. (quoting *Celotex*, 477 U.S. at 327). *See also Hartnagel*, 953 F.2d at 396 (explaining purpose of summary judgment procedure).

Thus, the trial court must assess whether a nonmovant's response would be sufficient to carry the burden of proof at trial. *Hartnagel*, 953 F.2d at 396 (citing *Celotex*, 477 U.S. at 322). If the nonmoving party fails to make a sufficient showing of an essential element of a claim with respect to which it has the burden of proof, then the moving party is "entitled to a judgment as a matter of law." *Celotex*, 477 U.S. at 322-23. *See also Woodsmith Pub. Co. v. Meredith Corp.*, 904 F.2d 1244, 1247 (8th Cir. 1990) (explaining when a party is entitled to judgment as a matter of law). However, if the court can conclude that a reasonable jury could return a verdict for the nonmovant, then summary judgment should not be granted. *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510; *Burk v. Beene*, 948 F.2d 489, 492 (8th Cir. 1991); *Woodsmith*, 904 F.2d at 1247.

III. MATERIAL FACTS

On April 19, 2000, doctors diagnosed Bakker with Bipolar Disorder I, a mixed history of some psychosis, and a few other mental health issues. After being diagnosed, Bakker regularly saw Dr. Galbreath, a psychiatrist, for his mental health issues. Dr. Galbreath prescribed several medications for Bakker including, but not limited to, Chlordiazepoxide, Tegretol, Ultram, Zoloft, and Zyprexa.

Bakker was confined at the Cherokee County Jail from December 26, 2000, through May 1, 2001. After being booked, Bakker received a copy of the Cherokee County Jail Policy and Procedures Manual.

During the first part of his confinement at the Cherokee County Jail, a relative brought Bakker his medications. The labels on the prescription bottles indicated each was to be taken every eight hours. Bakker informed the staff about his mental health issues the day after he was brought into custody. On December 27, 2000, a staff member called Dr. Galbreath to ask if Bakker's medications could be refilled.

From December 27, 2000, to January 18, 2001, the defendants required Bakker to take his medications each day at or about 8:00 a.m., 11:00 a.m., and 4:30 p.m. During this period, Bakker experienced physical problems as a result of being required to take all of his medications between 8:00 a.m. and 4:30 p.m. He reported feeling sick, "drunk," dizzy, and having trouble concentrating. On January 13, 2001, Bakker told the chief jailer about the physical problems he was experiencing because his medications were not being spaced out every eight hours. Specifically, Bakker informed the chief jailer that he was unable to urinate. On the same day, the chief jailer responded by sending Bakker to the hospital. Despite going to the hospital, Bakker continued to have physical problems.

On January 15, 2001, Bakker experienced physical pains and had a seizure while laying in his bunk. He was taken to the hospital, where he asked a doctor to test his serum Tegretol level. Bakker was not told what his Tegretol level was or whether there were any complications stemming from his serum Tegretol level. Upon returning from the hospital, Bakker heard the defendant Chuck Stubbe and other defendants laugh about the seizure he had experienced. On January 17, 2001, Bakker experienced another seizure while he was showering.

Cindy Peck, a jailer, told Bakker she believed his seizures and other physical problems were occurring because he was not taking his prescribed medications at the appropriate intervals. Bakker informed the defendant Barbara Kuhnes that he needed to take his medications at the times indicated on the prescription bottle labels.

On January 24, 2001, the defendant Lisa Kenny called Dr. Galbreath to determine what time each prescribed medication should be distributed to Bakker. Dr. Galbreath stated as follows:

> Zoloft, 100 mg. t.i.d. to be given at 8 a.m., 12 noon and 8 p.m.; Tegretol, 400 mg. t.i.d. [to be] given at 8 a.m., 12 noon and 8 p.m.; Zyprexa, 10 mg. q.h.s; Ultram to be given q.i.d. Patient is to go to Dr. Harrison for this because she prescribed it initially. His Chlordiazepoxide, 25 mg. t.i.d. [to be given] at 8 a.m., 2 p.m. and h.s.

After he began taking his medications at appropriate intervals, Bakker's physical and mental state improved. Bakker did not experience any additional seizures.

On February 11, 2001, Dr. Galbreath saw Bakker at the Cherokee County Jail and noted the following from his examination:

> [Bakker] apparently had a high level of Tegretol, approximately 11, upper limit is a normal of 10. He stated he was having seizures. I have no verification of this except what [he has] told me. However, he did mention that he had seizures before, but stated he had a head injury when he was a child when he reportedly fell down and hit his head on a sledge hammer and they were going to put a plate in but the mother opted not to do this. He does indicate things are going better for him, except he is just not sleeping too well and this is of concern to him.
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> [Bakker] also reports hearing voices. Was kind of vague about this. This is the first time [he has] really mentioned this to me that I can recall, at least, recently. He did not go into any detail, was kind of vague about this.

Between January 25, 2001 and April 24, 2001, Bakker submitted grievances to the jail regarding the following: dust affecting his sinus condition; amount of hot water available when taking a shower; small food portions; treatment by staff; his need to consume food with his medications; lack of medical attention regarding a foot injury; request to wear street clothing to depositions; the ability to get married; and the

effectiveness of the heating system.[3] Bakker never submitted a grievance between December 26, 2000 and May 1, 2001 regarding any of the claims at issue in the instant action.

IV. ANALYSIS

In their motion to dismiss, the defendants argue Bakker failed to exhaust his administrative remedies. To support their argument, the defendants rely on 42 U.S.C. § 1997e(a) and relevant case law. In his response, Bakker argues the merits of his deliberate indifference to serious medical needs claim, he claims 42 U.S.C. § 1997e(a) does not act as a bar to his claims, and he contends qualified immunity is not available to the defendants. Bakker does not address the defendants' contention that this matter should be dismissed for failure to exhaust administrative remedies. The defendants did not file a reply.

A. Local Rules and Federal Rules of Civil Procedure

Rule 7.1(e) of the court's Local Rules requires a party who resists a motion to "serve and file a brief containing a statement of the grounds for resisting the motion and citations to the authorities upon which the resisting party relies . . . ." L.R. 7.1(e). Rule 56.1(b) of the Local Rules requires a party who resists a motion for summary judgment to serve and file contemporaneously: 1) "a brief that complies with the requirements of L.R. 7.1(e) in which the resisting party responds to each of the grounds asserted in the motion for summary judgment;" 2) a separate response to the statement of material facts in which the resisting party "expressly admits, denies or qualifies each of the moving

[3]Bakker submitted multiple grievances regarding the small food portions, his treatment by staff, and his need to consume food with his medications.

party's numbered statements of fact;" 3) a separate statement of additional material facts the resisting party contends preclude summary judgment; and 4) a separate appendix.

When resisting the defendants' motion for summary judgment, Bakker filed four documents, including: 1) a "Resistance To Defendants' Motion For Summary Judgment"; 2) a "Memorandum In Resistance To Defendants' Motion For Summary Judgment"; 3) "Plaintiff's Statement Of Material Facts In Resistance To [Defendants'] Motion For Summary Judgment"; and 4) an "Appendix." In his "Memorandum In Resistance To Defendants' Motion For Summary Judgment," Bakker does not address the defendants' contention that this matter should be dismissed for failure to exhaust administrative remedies. As a result of this shortcoming, the court could treat the defendants' motion for summary judgment as an unresisted motion and grant the motion pursuant to Rule 7.1(f) of the Local Rules. Alternatively, the court could strike Bakker's pleading from the record as a sanction. *See* L.R. 1.1(f). The court, however, declines to utilize Rules 1.1(f) or 7.1(f) of the Local Rules, and will proceed to consider the information provided by Bakker when ruling on the merits of the defendants' motion for summary judgment. *See Interstate Power Co. v. Kansas Power & Light Co.*, 992, F.2d 804, 807 (8th Cir. 1993) ("Even if a motion for summary judgment on a particular claim stands unopposed, the district court must still determine that the moving party is entitled to judgment as a matter of law on that claim.").

B. Exhaustion Requirements Under 42 U.S.C. § 1997e(a)

42 U.S.C. § 1997e(a) provides:

> No action shall be brought with respect to prison conditions under [section 1983 of this title], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Exhaustion in cases covered by 42 U.S.C. § 1997e(a) is mandatory. *Porter v. Nussle*, 534 U.S. 516, 524, 122 S. Ct. 983, 988, 152 L. Ed. 2d 12 (2002) (citing *Booth v. Churner*, 532 U.S. 731, 739-41, 121 S. Ct. 1819, 149 L. Ed. 2d 958 (2001)); *Chelette v. Harris*, 229 F.3d 684, 688 (8th Cir. 2000) ("The [requirements of 42 U.S.C. § 1997e(a)] are clear: if administrative remedies are available, a prisoner must exhaust them."). "This is true even though relief of the sort that the plaintiff is seeking is not available through the administrative procedures that are available." *Lyon v. Vande Krol*, 305 F.3d 806, 808-09 (8th Cir. 2002) (citing *Booth*, 532 U.S. at 737-41). Inmates, however, cannot be held to the exhaustion requirement of 42 U.S.C. § 1997e(a) when prison officials have prevented them from exhausting their administrative remedies. *Id*. (discussing *Foulk v. Charrier*, 262 F.3d 687, 697-98 (8th Cir. 2001) and *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001)).

The exhaustion requirement under 42 U.S.C. § 1997e(a) applies to claims that allege inadequate medical care. *See*, *e.g.*, *Jones v. Norris*, 310 F.3d 610, 612 (8th Cir. 2002) (finding exhaustion requirements under 42 U.S.C. § 1997e(a) had not been met, and dismissing case as frivolous under 42 U.S.C. § 1997e(c) because "[n]either differences of opinion nor medical malpractice state an actionable Constitutional violation"); *Chelette*, 229 F.3d at 688 (requiring exhaustion where allegation concerned lack of medical care). Because Bakker alleges he received improper medical care, this case is governed by 42 U.S.C. § 1997e(a).

All inmates at the Cherokee County Jail are provided with writing materials so they can submit complaints, send letters, request medical attention, and communicate in writing. The jail has a grievance procedure for use by inmates who believe inappropriate actions have occurred. The grievance procedure is contained in the Cherokee County Jail Policy and Procedures Manual, and provides as follows:

> In the event an inmate has a grievance, he/she may submit in writing, a full explanation of his/her complaint or grievance to

> the Jail Administrator. The inmate's signature is required on this complaint. The inmate shall be given a written response within 72 hours. If the inmate is not satisfied with the results, he/she may appeal this decision to the Cherokee County Sheriff. This will only be allowed when all other action has failed to bring a decision.

Inmates are provided a copy of the Cherokee County Jail Policy and Procedures Manual when they are assigned to a cell. During Bakker's incarceration at the Cherokee County Jail, the grievance procedure was in place and Bakker was aware of it.

In order to document the activities of inmates confined at the Cherokee County Jail, files are maintained on each inmate. If a grievance is submitted by an inmate, a copy is kept in the inmate's file. Bakker's file reveals he utilized the grievance procedure on several occasions. Bakker admits he never submitted a written grievance regarding his deliberate indifference to serious medical needs claim; however, he claims the high dosages of medications given to him at inappropriate intervals prohibited him from being of sound mind to draft a grievance.

Bakker has not shown that administrative remedies were unavailable to him. Although he claims the high dosages of medicines given to him at inappropriate intervals from December 27, 2000 to January 18, 2001, prohibited him from being of sound mind to draft a grievance, Bakker admits he had access to the grievance process and he did not submit a written grievance with respect to his medical needs claim. Nothing in the record suggests Bakker could not have utilized the administrative remedies that were available to him from January 18, 2001, which is the date he started receiving his prescriptions at the correct intervals, to May 1, 2001, which is the date he left the Cherokee County Jail. Indeed, the record indicates Bakker utilized the jail's grievance procedure to raise other claims on numerous occasions during that time period. Based on Bakker's pleadings, it is clear the burden under 42 U.S.C. § 1997e(a) has not been met. *See Lyon*, 305 F.3d at 809 (plaintiff was aware of grievance procedure but chose not to follow the steps

required). *But cf. Miller*, 247 F.3d at 740 (plaintiff's allegations raised an inference that he was prevented from utilizing administrative remedies available to him).

There are no disputed issues of material fact with respect to the defendants' motion for summary judgment. The court finds Bakker failed to exhaust his administrative remedies, and the defendants' motion for summary judgment should be granted.

V. CONCLUSION

For the reasons discussed above, the defendants' motion for summary judgment is **granted**. Judgment will be entered in favor of the defendants. The defendants' request for costs to be assessed against Bakker is **denied**.

IT IS SO ORDERED.

DATED this 14th day of May, 2004.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT